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IN THE

Supreme Court of the United States

OCTOBER TERM 1940.

NUMBER 836

ELSIE VAN VRANKEN,
Petitioner,

against

GUY T. HELVERING, Commissioner of Internal Revenue,
Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

LEE MCCANLISS,
Counsel for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1940.

NUMBER ____

ELSIE VAN VRANKEN,

Petitioner,

against

GUY T. HELVERING, Commissioner of Internal Revenue,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of ELSIE VAN VRANKEN respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a judgment of that Court, entered in this case on December 18, 1940, and therefore shows as follows:

I.

Summary Statement of the Matter.

(a) **Nature of the suit.**

The petitioner petitioned the United States Board of Tax Appeals for a redetermination of the deficiency in her Federal income tax for the calendar year 1935, which deficiency, in the sum of $8,170.22, was assessed against her by the respondent. The said Board decided that the de-

ficiency amounts to $7,861.92. The petitioner petitioned the United States Circuit Court of Appeals for the Second Circuit to review the decision of the said Board. The order for mandate of the said Court affirms the decision of the said Board.

(b) **Summary of facts.**

John S. Eakins died on August 16, 1915, a resident of Kings County, New York, leaving a will (pp. 35 to 42, inclusive, of the record), which was probated, which gave his residuary estate in trust to pay the income to Amelia A. Eakins, his wife and the mother of the petitioner, for the life of the said Amelia A. Eakins, and upon her death to make certain other dispositions of the trust fund and to pay over the remainder to his daughter, Elsie Van Vranken, who is the petitioner, if she should outlive his wife, or, if she should die during her mother's life, to pay over such remainder to his daughter's issue. The said Amelia A. Eakins died on April 26, 1930.

Included in the estate of the petitioner's father were 50 shares of Union Pacific Railway Company stock, 25 shares of Delaware & Hudson Railway Company stock, and 500 shares of American Gas & Electric Company stock. Those securities were retained in the trust fund held for the benefit of the petitioner's mother. As a part of the petitioner's share of the remainder of the estate of her father, the petitioner received and accepted the said securities in kind after the death of her mother at their then values. The value of the said stocks on August 16, 1915, the date of the testator's death, was $10,930.77. At the death of the petitioner's mother on April 26, 1930, the stocks were worth $89,153.12. In 1935 the petitioner sold the said stocks for $24,394 (p. 34 of the record).

In preparing her income tax return for the year 1935, the petitioner claimed a loss of $64,759.12 on the sale of

the aforementioned securities, and claimed 40% thereof, or $25,903.64, as a loss deduction. The petitioner determined this loss by using the 1930 valuation as the basis.

In computing the deficiency in question, the respondent used as the basis the value of the securities at the date of death of the petitioner's father, on August 16, 1915, with the result that the loss deduction of $25,903.64 was disallowed and a percentage of the gain resulting from the basis adopted by the respondent was added, creating an estimated deficiency of $8,170.22.

As recomputed for the purpose of the final decision of the said Board, the figures presented in a simple manner are as follows:

Net income returned	$20,119.04
The said loss deduction disallowed	25,903.64
30% of gain on the said sales added, computed on the basis of $24,394 received, less value in 1915—$10,930.77, or $13,463.23—30%	4,038.97
Uncontested additions	657.57
Total net income	$50,719.22
Total tax $9,578.99, paid $1,717.07, deficiency	$ 7,861.92

The sum of $29,942.61, the aggregate of the foregoing items of $25,903.64 and $4,038.97, is in controversy.

(c) **Question involved.**

The controversy is whether the petitioner became entitled to a loss deduction or, on the contrary, became taxable upon a principal gain; that is to say, whether the true basis for determining gain or loss is the value of the said stocks at her mother's death in 1930, as maintained by the petitioner, or at her father's death in 1915, as maintained by the respondent.

II.

Reason relied on for the allowance of the writ.

The decision of the Circuit Court of Appeals for the Second Circuit in this case is in direct conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit on the same question in the case of *Richard J. Reynolds, Petitioner,* v. *Commissioner of Internal Revenue, Respondent,* as more fully appears in the opinion rendered in the latter case on October 7, 1940, 114 Fed. (2d) 804. In the *Reynolds* case a writ of certiorari was granted by this Court on February 17, 1941. The precise question is also involved in *Flagler* v. *Commissioner, Archbald* v. *Commissioner,* and *Augustus* v. *Commissioner,* in the first of which cases certiorari has been granted, and in the second and third of which cases, certiorari has been applied for.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and send to this Court, for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and of all proceedings in this cause, to the end that the said cause may be reviewed and determined by this Court according to law, and that your petitioner may have such other and further relief as to this Court may seem proper and in conformity with law.

And your petitioner will ever pray.

LEE MCCANLISS
Counsel for Petitioner.

Dated, March 13, 1941.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions of the Courts Below.

The opinion of the Circuit Court of Appeals in this case is reported in 115 Federal (2nd) 709. It will be found on pages 58 to 63, inclusive, of the Record. The findings of fact and the opinion of the Board of Tax Appeals are reported in 40 U. S. Board of Tax Appeals, 956, and will be found on pages 16 to 23, inclusive, of the Record.

Jurisdiction.

1. The jurisdiction of this Court is invoked under subdivision (a), Section 347, Title 28, United States Judicial Code, being Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, Chapter 229; 43 Stat. 938.

2. The judgment of the Circuit Court of Appeals was entered on December 18, 1940, and will be found on page 64 of the Record.

3. The nature of the case, the rulings of the Board of Tax Appeals and of the Circuit Court of Appeals, for the Second Circuit, and the reasons why a writ of certiorari should be granted are set forth in the foregoing petition.

Statement of the Case and Question Involved.

The petition for the writ of certiorari contains a statement of the case and of the question involved, as well as of all the facts material to its consideration.

Specification of Errors.

The Circuit Court of Appeals erred:

1. In holding that the words "time of such acquisition", appearing in Section 113(a) (5) of the Revenue Act of 1934, which subsection, as far as material, is as follows:

> "Property transmitted at death.—If the property was acquired by bequest, devise, or inheritance, or by the decedent's estate from the decedent, the basis shall be the fair market value of such property at the time of such acquisition * * *.",

mean the date of the death of the testator in every case of a gift by will, whether the interest acquired under the will be vested or contingent.

2. In entering judgment for the respondent.

Summary of Argument.

The petitioner contends that the gift to her was future and contingent and that she did not take any remainder under her father's will until her mother died in 1930; that if the gift to the petitioner were to be considered as immediate, nevertheless, the remainder would be contingent, since the gift was expressly conditioned upon the petitioner outliving her mother ('if she shall outlive my wife'), and survivorship was a condition precedent and futurity was inherent in the gift; that the basis, under the Revenue Act of 1934 (which is the applicable act), for determining gain or loss realized upon property acquired by bequest is the fair market value of such property at the time of its acquisition; and that under that act, which was a re-enactment in that particular of the Revenue Acts of 1921, 1924 and 1926, the time when the petitioner acquired the stocks

in question was the date of her mother's death on April 26, 1930.

Argument.

In making the time of acquisition the basis in the case of property acquired by will, the Revenue Act of 1934 was a re-enactment of the Revenue Acts of 1921, 1924 and 1926. The Revenue Acts of 1921, 1924, 1926, 1928, 1932, 1934, 1936, 1938 and 1939, as they relate to this question, are included in the Appendix.

The Treasury Rulings prior to the Ruling adopted in relation to the Revenue Act of 1934, were to the effect that the "time of acquisition", in the case of a contingent interest, meant the date of vesting. The Treasury Regulations, Rulings, Decisions and Memoranda, being Article 56 of Regulations 45, Ruling and Decision in Cumulative Bulletin No. 3, July-December, 1920, pages 50 and 53, General Counsel's Memorandum No. 10260, Cumulative Bulletin XI-1, January-June, 1932, page 79. General Counsel's Memorandum, Cumulative Bulletin XIV-1, January-June, 1935, page 202, and relevant excerpts from Treasury Regulations 86, Income Tax, Revenue Act of 1934, and Treasury Regulations 103, Income Tax, Internal Revenue Code (1940) are included or summarized in the Appendix.

The Court decisions in relation to the Revenue Acts of 1921, 1924, 1926, and 1928 are uniformly to the effect that acquisition, in the case of a vested remainder created by will, occurs at the death of the testator, while acquisition, in the case of a contingent remainder, occurs at the death of the life tenant.

Chandler v. *Field,* 63 Fed. (2d) 13;

Lane v. *Corwin,* 63 Fed. (2d) 767;

Pringle v. *Commissioner,* 64 Fed. (2d) 863;

Molter v. *Commissioner,* 96 Fed. (2d) 7;
Hopkins v. *Commissioner,* 69 Fed. (2d) 11;
Warner v. *Commissioner,* 72 Fed. (2d) 225;
Roebling v. *Commissioner,* 78 Fed. (2d) 444;
Beers v. *Commissioner,* 78 Fed. (2d) 447;
Twining v. *Commissioner,* 83 Fed. (2d) 954;
Fidelity & Columbia Trust Co. v. *Commissioner,* 90 Fed. (2d) 219.

The petitioner contends that the new Treasury Regulations, in so far as they relate to contingent interests, are ineffectual for the reason that Section 113(a)(5) of the Revenue Acts of 1934, 1936, 1938 and 1939 were re-enactments of the related provisions of the Revenue Acts of 1921, 1924 and 1926, and that Congress, in thus re-enacting the provisions of those Acts, intended the re-enacted sections to mean, and to be construed to mean, just what the *Federal Courts,* in dealing with those sections of the Acts of 1921, 1924 and 1926, and the Regulations in relation to them, had said that they meant.

The following rules seem to be established beyond controversy: (1) that a provision of the Regulations which is not consistent with the Revenue Law is invalid (*Koshland* v. *Helvering,* 298 U. S. 441); (2) that the re-enactment of statutory provisions gives existing Regulations relating thereto the force of law (*Helvering* v. *R. J. Reynolds Tobacco Co.,* 306 U. S. 110; (3) that when a statute is repealed or amended and then re-enacted, the statute is to have the same construction as when previously in force (*The Devonshire,* 13 Fed. 39; *Case* v. *Los Angeles Lumber Co.,* 308 U. S. 106, 115).

There has been a uniform holding by the Treasury Department and the Courts in relation to all Revenue Acts

from 1916 to 1932 that acquisition in the case of a contingent interest occurs when the interest vests. The Revenue Act of 1934 should be construed accordingly.

The Senate Committee on Finance, in reporting upon the Revenue Act of 1928, rejected the report of the House Committee suggesting as a basis *the date of the decedent's death.* The Senate Report Number 960, 70th Congress, First Session, page 26, is included in the Appendix. The Senate Committee on Finance, in reporting upon the Revenue Act of 1934, said:

> "Since the 1928 Act was passed, the Supreme Court has defined 'the date of acquisition' to mean the date of death in the case of all property passing by bequest, devise and inheritance, whether real or personal (*Brewster* v. *Gage,* 280 U. S. 327). Section 113(a)(5) of the House Bill conforms to the language contained in the Revenue Act of 1926, so that a uniform basis rule may be required in the case of property passing at death, whether real or personal."

The Congress must have understood that the decision in *Brewster* v. *Gage* related only to vested interests and did not apply to property which did not vest or pass at death but in which only a possibility of an interest or a contingent interest arose at death by reason of the provisions of the will. Otherwise, it would seem that the suggestion of the House Committee, made in its report upon the Revenue Act of 1928, that the words *time of decedent's death* be substituted for the words *time of acquisition,* would have been renewed and accepted by the Senate Committee. The report of the Senate Committee on Finance on the Revenue Act of 1934, Number 558, 73rd Congress, Second Session, pages 34 and 35, is included in the Appendix.

It should not be assumed that the Congress adopted language construed to distinguish between vested and

contingent interests and intended it to take on a meaning different from that which the language had been construed to have, and yet failed to make any explanation or comment in relation to its intention. In fact, there is no ambiguity in Section 113(a)(5) of the Revenue Act of 1934 as a re-enactment of the provisions of the Revenue Act of 1926.

It is submitted that the case of *Helvering* v. *Hallock*, 309 U. S. 196, relied upon by the Court below, has no application to the question here at issue.

The authorities upon which the petitioner more particularly relies to establish her contention that the gift to her in her father's will was future and contingent are the cases of *Smith* v. *Edwards*, 88 N. Y. 92 and *Townshend* v. *Frommer*, 125 N. Y. 446, which explain the rule "where there is no gift but a direction to executors or trustees to pay or divide, and to pay at a future time, the vesting in the beneficiary will not take place until that time arrives," and the case of *Matter of Crane*, 164 N. Y. 71, which applies the rule; the cases of *Roebling* v. *Commissioner*, 78 Fed. (2d) 444, and *Molter* v. *Commissioner*, 69 Fed. (2d) 7, which explain the rule "if survivorship, or other conditional element is incorporated in the gift or in the designation of the remainderman, such as such children as survive a certain time, the remainder will be contingent," and the cases of *Hall* v. *LaFrance Fire Engine Company*, 158 N. Y. 570; *United States Trust Company* v. *Roche*, 116 N. Y., 120; *McGillis* v. *McGillis*, 154 N. Y. 532, *Brooklyn Trust Company* v. *Phillips*, 134 App. Div., 697, affirmed 201 N. Y. 561; and *National Park Bank* v. *Billings*, 144 App. Div., 536, affirmed 203 N. Y., 556; all of which apply the rule,

and the last one of which clearly, convincingly and decisively applies it.

CONCLUSION.

It is, therefore, respectfully submitted that the petition for a writ of certiorari should be granted as prayed for.

Respectfully submitted,

LEE MCCANLISS,
Counsel for Petitioner.

LEE MCCANLISS,
ARCHER P. CRAM,
Of Counsel.

Appendix.

Revenue Acts.

The Revenue Act of 1921 contains the following:

"Sec. 202(a) That the basis for ascertaining the gain derived or loss sustained from a sale or other disposition of property, real, personal, or mixed, acquired after February 28, 1913, shall be the cost of such property; except that * * *

Sec. 202(a) (3) On the case of such property, acquired by bequest, devise or inheritance, the basis shall be the fair market price or value of such property at the time of such acquisition * * *."

The Revenue Acts of 1924 and 1926, in each case contain the following:

"Sec. 204(a) The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that * * *

Sec. 204(a) (5) If the property was acquired by bequest, devise, or inheritance, the basis shall be the fair market value of such property at the time of such acquisition * * *."

The Revenue Act of 1928 contains the following:

"Sec. 113. Basis for Determining Gain or Loss.

Sec. 113(a) Property acquired after February 28, 1913.—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that * * *

Sec. 113(a) (5) Property transmitted at death.—If personal property was acquired by specific bequest, or if real property was acquired by general or

specific devise or by intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent. If the property was acquired by the decedent's estate from the decedent, the basis in the hands of the estate shall be the fair market value of the property at the time of the death of the decedent. In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer * * *."

The Revenue Act of 1932 contains the following:

"Sec. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

Sec. 113(a) Basis (unadjusted) of property.—The basis of property shall be the cost of such property; except that—

Sec. 113(a)(5) Property transmitted at death.—If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise or by intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent. If the property was acquired by the decedent's estate from the decedent, the basis in the hands of the estate shall be the fair market value of the property at the time of the death of the decedent. In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer * * *."

The Revenue Acts of 1934, 1936, 1938 and 1939, in each case, contain the following:

"Sec. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

Sec. 113(a) Basis (unadjusted) of property.—The basis of property shall be the cost of such property; except that * * *

Sec. 113(a)(5) Property transmitted at death.—If the property was acquired by bequest, devise or inheritance, or by the decedent's estate from the decedent, the basis shall be the fair market value of such property at the time of such acquisition * * *."

Treasury Regulations, etc.

Article 56 of Regulations 45 provided in part:

"In the case of property acquired by gift, bequest, devise or descent, the basis for computing gain or loss on a sale is the fair market price or value of the property at the time of acquisition or as of March 1, 1913, if acquired prior thereto."

In Cumulative Bulletin Number 3, July-December, 1920, page 50, the then Solicitor of Internal Revenue ruled that the then existing rule, as the basis for determining that gain or loss from a sale by a remainderman after the termination of a life estate was the value of the property upon the date when the remainder vested in possession, be overruled and the rule established that such basis should thereafter be not when possession or enjoyment vested in fact but when the right to possession vested although enjoyment might be postponed.

In the same Cumulative Bulletin, at page 53, appears the following Office Decision:

"Where in a bequest of property the remaindermen have only a contingent interest prior to the death of the life tenant, the basis for determining gain or loss from a sale of such property by the remaindermen is its value as of the date of death of the life tenant."

The foregoing Regulation to the effect that in the case of property acquired by gift, etc., the basis is the value at the time of acquisition, etc., was in substance adopted as a

part of the Revenue Act of 1921. General Counsel's Memorandum Number 10,260 is contained in Cumulative Bulletin XI-1, January-June, 1932, page 79, in which memorandum the following appears:

> "* * * Contingent beneficiaries or remaindermen are not regarded as having 'acquired' property under the Revenue Acts, and, consequently, in such cases 'distribution,' as well as acquisition, is necessarily contingent until substantial ownership vests, at which time distribution to them is automatically concluded. * * *"

In General Counsel's Memorandum, Cumulative Bulletin XIV-1, January-June, 1935, page 202, relating to the Revenue Act of 1928, the Treasury Department abandoned the standard of substantial ownership and ruled that "vesting of some recognized sort" fixed the time of acquisition.

In Treasury Regulations 86, Income Tax, Revenue Act of 1934, the following appears:

> "Under the law governing wills and the descent and distribution of the property of decedents, all titles to property acquired by bequest, devise, or inheritance relate back to the death of the decedent, even though the interest of him who takes the title was, at the date of death of the decedent, legal, equitable, vested, contingent, general, specific, residual, conditional, executory, or otherwise. Pursuant to this rule of law, section 113(a)(5) prescribes a single uniform basis rule applicable to all property passing from a decedent by will or under the law governing the descent and distribution of the property of decedents. Accordingly, the time of acquisition of such property is the death of the decedent, and its basis is the fair market value at the time of the decedent's death, regardless of the time when the taxpayer comes into possession and enjoyment of the property."

In Treasury Regulations 103, Income Tax, Internal Revenue Code (1940) the following appears:

> "* * * the basis of property acquired from a decedent by will or under the law governing the descent and distribution of the property of decedents is the fair market value at the time of such acquisition. Since, under the law governing wills and the distribution of the property of decedents, all titles to property acquired by bequest, devise, or inheritance relate back to the death of the decedent, even though the interest of him who takes the title was, at the date of death of the decedent, legal, equitable, vested, contingent, general, specific, residual, conditional, executory, or otherwise, the time of the acquisition of such property is the death of the decedent."

Senate Reports.

Senate Report No. 960, 70th Congress, 1st Session, page 26, contains the following:

> "SEC. 113.—BASIS FOR DETERMINING GAIN OR LOSS.—EXECUTOR'S SALE.
>
> The decision by the Court of Claims in *McKinney* v. *United States* has caused confusion in the existing law as to the basis on which an executor must determine gain or loss on the sale by him of property of the estate. The House Bill in section 113(a)(5) provides that in such cases the basis shall be the fair market value of the property at the time of the death of the decedent. In the same section the House bill provides the same basis shall be used where the property is sold by the beneficiary.
>
> It appears that the House bill is inadequate to take care of a number of situations which frequently arise. For example, the executor, pursuant to the terms of the will, may purchase property and distribute it to the beneficiaries, in which case it is im-

possible to use the value at the decedent's death as the basis for determining subsequent gain or loss, for the decedent never owned the property. Moreover, the fair market value of the property at the decedent's death can not properly be used as the basis, in the case of property transferred in contemplation of death where the donee sells the property while the donor is living.

Accordingly, the committee has revised section 113(a) (5) and certain related sections, so as to provide that in the case of a specific bequest of personalty or a general or specific devise of realty, or the transmission of realty by intestacy, the basis shall be the fair market value at the time of the death of the decedent. In these cases it may be said, as a matter of substance, that the property for all practical purposes vests in the beneficiary immediately upon the decedent death, and therefore the value at the date of death is a proper basis for the determination of gain or loss to the beneficiary. The same rule is applied to real and personal property transmitted by the decedent, where the sale is made by the executor. In all other cases the basis is the fair market value of the property at the time of the distribution to the taxpayer. The latter rule would obtain, for example, in the case of personal property not transmitted to the beneficiary by specific bequest, but by general bequest or by intestacy. It would also apply in cases where the executor purchases property and distributes it to the beneficiary."

Senate Report No. 558, 73rd Congress, 2nd Session, pp. 34 and 35 contains the following:

"Under section 113(a) (5) of the Revenue Act of 1932, the basis for determining gain or loss, for income-tax purposes, on the sale or other disposition of property transmitted at death is, in the following cases,

the fair market value thereof at the time of the death of the decedent:

(1) Where personal property was acquired by specific bequest;

(2) Where real property was acquired by general or specific devise, or by intestacy;

(3) Where the property, real or personal, was acquired by the decedent's estate from the deceased.

In all other cases, if the property was acquired by will or intestacy, the basis is the fair market value of the property at the time of distribution to the taxpayer.

Included within the phrase 'all other cases' is personal property acquired by general or residuary bequest. Thus, where a trustee acquires personal property by general bequest, the basis of the property on a sale by him, is the value at the time of distribution to him. The basis to the executor, in all cases, is the value of the property at the date of the decedent's death.

Oftentimes, the executor and trustee under a will are one and the same person. Thus, in the case of a general bequest of personal property, he is in a position to make use of one basis of valuation or the other according to which will most benefit the estate. The trustee, of course, may use a later basis than the executor, and where it is desired to sell personal property subject to a trust during the period of administration, the executor-trustee may determine whether it would be most advantageous to sell as executor or as trustee. Where the personal property has increased in value in the hands of the executor, under a general bequest, the property may be distributed to the trustee, who may use the higher basis in computing gain or loss on the sale, thereby diminishing the taxable increment and greatly reducing or entirely avoiding the income tax.

Section 113(a) (5) of the Revenue Act of 1932 is a reenactment of a similar provision contained in the 1928 act. The change in the 1928 act was made because there was some doubt as to the meaning of the term 'date of acquisition', which was the term used under the Revenue Act of 1926. Since the 1928 act was passed, the Supreme Court has defined 'the date of acquisition' to mean the date of death in the case of all property passing by bequest, devise, and inheritance, whether real or personal. (*Brewster* v. *Gage*, 280 U. S. 327.) Section 113(a) (5) of the House bill conforms to the language contained in the Revenue Act of 1926, so that a uniform basis rule may be required in the case of property passing at death, whether real or personal. The only change made by your committee to this paragraph of the House bill is to make it clear that if the property of the decedent is sold by the executor or other representative of the estate of the decedent, the basis for computing gain or loss from such sale is the fair market value at the date of death, which is the same basis adopted under the House bill when the property is sold by the beneficiary. The section also includes a provision relating to general powers of appointment exercised by will, which was explained in connection with section 113(a) (4)."

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 836

ELSIE VAN VRANKEN, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT

The question presented is as to the proper basis, under Section 113 (a) (5) of the Revenue Act of 1934, for determining gain or loss upon sales of securities which petitioner received from a testamentary trust. Section 113 (a) (5) provides that the basis for property "acquired by bequest, devise, or inheritance," shall be its value "at the time of such acquisition." Petitioner was the remainder beneficiary of the trust; the testator died in 1915 and the life tenant under the trust died in 1930. Petitioner contends that she "acquired" the prop-

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erty at the death of the life tenant and that its basis is its value on that date. The Government contends that she "acquired" the property upon the death of the testator, and that its basis is its value on that date.

Substantially the same question is before this Court in *Helvering* v. *Reynolds,* 114 F. (2d) 804 (C. C. A. 4th), certiorari granted, No. 684, this Term, and in *Cary* v. *Helvering,* and associated cases, 116 F. (2d) 800 (C. C. A. 2d), certiorari granted, Nos. 734–737, this Term.[1] Therefore, we do not oppose the granting of a writ in the present case, but suggest that the Court may wish to withhold action on the petition for certiorari in the present case pending disposition of the *Reynolds* and *Cary* cases.

Further, other related questions have already been argued before this Court in *Maguire* v. *Helvering,* No. 346, this Term, and *Helvering* v. *Gambrill,* and associated cases, Nos. 472–475, this Term, and it may be that the decisions in those cases will substantially dispose of the questions in the present case and in the *Reynolds* and *Cary* cases.

If the outcome of the present cases should depend, contrary to the Government's contention, upon whether the interests of petitioners under the

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[1] The same question is also presented by the petition for certiorari in *Augustus* v. *Helvering,* No. 819, this Term.

trust were "vested" or "contingent", we wish to reserve the right to contend that the interests were vested rather than contingent.

Respectfully submitted.

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Solicitor General.

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